73-1334

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Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1334

Haywood L. Peele,

Petitioner,

v.

Robert E. Jones, Superintendent of Polk Youth Center,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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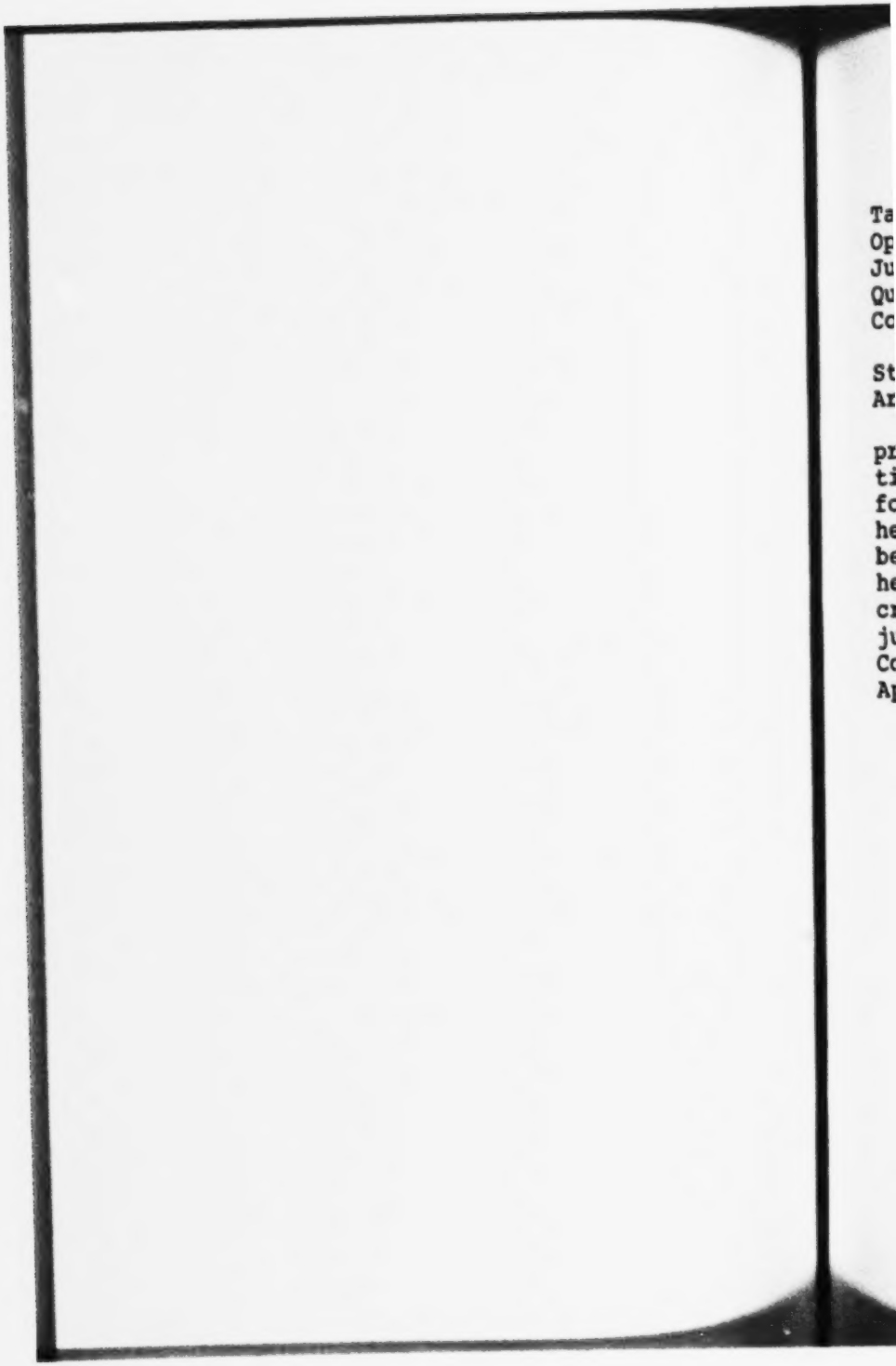

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

****

The petitioner, Haywood L. Peele, prays that a writ of certiorari issue to review the judgment of the United States District Court for the Eastern District of North Carolina, entered in the above case on March 9, 1973, review of which judgment was declined by denial to issue a certificate of probable cause in the United States Court of Appeals for the Fourth Circuit on December 14, 1973.

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of North Carolina, and the

memorandum decision of the United States Court of Appeals for the Fourth Circuit, in this case are not reported. Copies of these decisions are appended to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit denying certificate of probable cause to appeal was made and entered on December 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether it is a denial of the equal protection of the laws in violation of the Fourteenth Amendment for a state to deny a preliminary hearing to a criminal defendant before indictment, when preliminary hearings are regularly accorded criminal defendants in that jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

General Statutes of North Carolina:

N.C.G.S. 15-86

Procedure, when justice has not final jurisdiction.--In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided.

N.C.G.S. 15-87

Duty of examining magistrate.--The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time

before the hearing begins in which to send for and advise with counsel.

N.C.G.S. 15-88

Testimony reduced to writing; right to counsel.--The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

N.C.G.S. 15-89

Prisoner examined; advised of rights.--The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that

his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

N.C.G.S. 15-92

Witnesses for defendant examined. --After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.

N.C.G.S. 15-94

When prisoner discharged.--If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner.

N.C.G.S. 15-95

When prisoner held to answer charge.--If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison.

N.C.G.S. 7A-194

Criminal procedure generally.--Except as otherwise provided in this chapter, the criminal procedure provided in chapter 15 of the General Statutes applies in the district court division of the General Court of Justice.

N.C.G.S. 7A-272(b)

The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment.

STATEMENT OF THE CASE

Petitioner is imprisoned by the North Carolina Office of Correction pursuant to a commitment entered on January 20, 1972, by the Superior Court Division of the Cumberland County, North Carolina, General Court of Justice.

Officers of the Fayetteville, North Carolina, police department arrested petitioner on August 31, 1971, and charged him with armed robbery and murder committed in the perpetration of robbery. No preliminary hearing was held in the District Court Division of the Cumberland County General Court of Justice to determine whether probable cause existed for transfer of the case to the Superior Court Division for trial. Subsequent to the arrest, petitioner was indicted by the

Cumberland County grand jury during the September 20, 1971, session of court. He was brought to trial in the Superior Court Division on the bill of indictment. Petitioner was convicted and was sentenced to imprisonment for life and an additional term of 25 to 30 years for the felonies, respectively, of murder committed in the perpetration of robbery and armed robbery. The conviction for armed robbery was set aside by the Supreme Court of North Carolina. State v. Peele, 281 N.C. 523, 188 S.E.2d 326 (1972).

The allegations of the application for writ of habeas corpus, which were not rebutted and must be taken to be true since there was no evidentiary hearing, were that it is the usual and regular procedure in Cumberland County and elsewhere in North Carolina, for persons accused of felonies to be given preliminary hearings in district court to determine whether probable cause exists for the prosecution to be transferred to superior court; and that petitioner was differentiated from other persons similarly situated and was irrationally and arbitrarily deprived of the opportunity to have a preliminary hearing.

The District Court properly found that petitioner had exhausted his state remedies to the extent required by 28 U.S.C. sec. 2254 (b). His efforts to exhaust state remedies included an application for post-conviction relief in the Superior Court Division of the Cumberland County General Court of Justice, raising the same issue set forth here, which was denied without hearing on September 19, 1972; and a petition for writ of certiorari to the North Carolina Court of Appeals to review the denial of post-conviction relief, again raising this issue, which the Court of Appeals denied on November 17, 1972.

The proceeding in District Court was by application for writ of habeas corpus; jurisdiction of the district court was founded on 28 U.S.C. sec. 2241(a), (c) (3). Appeal of the district court decision to the United States Court of Appeals was pursuant to 28 U.S.C. sec 2254; the judgment of the district court became non-appealable by virtue of the decision of the United States Court of Appeals to deny a certificate of probable cause.

ARGUMENT

The decision below should be reviewed because the United States District Court for the Eastern District of North Carolina decided an important federal question in a way which is in conflict with applicable decisions of this Court, and the United States Court of Appeals for the Fourth Circuit declined to review and reverse this decision.

It is a denial of the equal protection of the laws in violation of the Fourteenth Amendment for a state to deny a preliminary hearing to a criminal defendant before indictment, when preliminary hearings are regularly accorded criminal defendants in that jurisdiction.

Coleman v. Alabama, 399 U.S. 1, 9 (1970), establishes that the typical preliminary hearing provided in state criminal prosecutions, held by a judicial officer in advance of the trial by a jury, is a "critical stage" of the state's criminal process at which the accused

is entitled to the assistance of counsel. The Court enumerated the reasons why the preliminary hearing is essential to protect the accused against an erroneous or improper prosecution:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

Following Coleman v. Alabama, it was specifically held that the North Carolina preliminary hearing is a "critical stage" in a criminal prosecution by Vance v.

North Carolina, 432 F.2d 984 (4th Cir. 1970).

Preliminary hearings are specifically required by the applicable North Carolina statutes. N.C.G.S. sec. 15-86 to 89, 15-92, 15-94, 15-95, 7A-194, 7A-272(b). While the Supreme Court of North Carolina has countenanced the violation of these statutes, and has permitted state prosecutors to bypass the preliminary hearing and proceed directly by indictment, State v. Hargett, 225 N.C. 412, 121 S.E.2d 589 (1961), preliminary hearings are still the rule in North Carolina, and the ommission of such proceedings is the rare exception. See Vance v. North Carolina, supra. The unchallenged allegations of the petition for habeas corpus in this proceeding are that it is the normal procedure in state felony prosecutions in North Carolina for the accused to be given a preliminary hearing in district court to determine whether probable cause exists for transfer of the case to superior court, and that the petitioner was differentiated from other persons similarly situated and was irrationally and arbitrarily deprived of the opportunity to have a preliminary hearing.

A serious contention can be advanced that the states are not free to dispense with preliminary hearings altogether, and that a preliminary hearing is required in every prosecution for a serious crime on due process principles, since the arrest and continued detention of an individual

facing criminal charges is a "seizure" within the meaning of the Fourth Amendment. Beck v. Ohio, 379 U.S. 89 (1964). It would seem a rational application of Coleman v. Alabama to hold that if the Constitution prohibits denial of counsel at a preliminary hearing, it must also be unconstitutional to abolish the preliminary hearing altogether, just as "[I]f the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all." United States v. Prince, 383 U.S. 787 (1966). The Court apparently assumed in Hurtado v. California, 110 U.S. 516, 537 (1884), that the validity of both prosecutor's presentments and grand jury indictments depended upon "examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution,..." Compare Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971) and Pugh v. Rainwater, 332 F.Supp. 1107 (D.C. Fla. 1971), 336 F.Supp. 490 (D.C. Fla. 1972), with Graves v. Eyman, 373 F.2d 324 (9th Cir. 1967).

The broader question of whether preliminary hearings are required whenever an accused faces serious criminal charges need not be resolved in the present proceeding. Here petitioner is the victim of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, and he is entitled to relief on that ground.

Griffin v. Illinois, 351 U.S. 12, 17-18 (1956), holds that although "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," if a state does grant appellate review, it cannot "do so in a way that discriminates against some convicted defendants. . . ." There it was held that if a trial transcript is necessary for a convicted defendant to perfect an appeal, the state must provide a transcript without cost to an indigent defendant.

It is true that Griffin v. Illinois and several of the cases following it, such as Mayer v. City of Chicago, 404 U.S. 189 (1971), have the common feature that the practice in question discriminates against indigents as a class. In contrast the present case does not involve discrimination based on suspect classifications like wealth, race, or religion. The Equal Protection Clause is not thus limited in its scope, however, and operates to prohibit any arbitrary and invidious discrimination. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

It is suggested in this argument that the probable cause hearing may be an absolu requirement in all state prosecutions for serious crimes. Assuming arguendo that the probable cause hearing is not universally required, it is a proceeding basic to our system of criminal law, and is intimately bound up with the rights of due process that are guaranteed to a

criminal defendant, including representation by counsel, confrontation and cross-examination, the right to be heard in his own defense, the privilege against self-incrimination, and the right to compel the attendance of witnesses. Coleman v. Alabama, supra. Because the denial of a preliminary hearing to this petitioner affected his "fundamental rights" the deprivation can be justified only by a "compelling governmental interest." Shilb v. Kuebel, 404 U.S. 357 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

Even if it could be determined that fundamental rights of the petitioner were not affected by this deprivation, so that the "compelling governmental interest" test is not controlling, the denial of a probable cause hearing to petitioner would have to be grounded upon a rational basis, to be sustained under the Equal Protection Clause. The record contains no explanation of why petitioner was denied a probable cause hearing. The distinction by which petitioner was denied a probable cause hearing, and most other criminal defendants in North Carolina are accorded such hearings, could be sustained only if it has "some basis in practical experience," South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), or if "any state of facts reasonably may be conceived to justify" it, McGowan v. Maryland, 366 U.S. 420, 426 (1961).

The denial to petitioner of a preliminary hearing cannot be sustained under either the "compelling governmental interest" test or the "rational basis" test. No legitimate purpose can be conceived for a

prosecutor to short-circuit the preliminary hearing procedure by going directly to the grand jury for an indictment. By eliminating the preliminary hearing, the prosecutor can take advantage of an ex parte proceeding before the grand jury, where his adversary is not present and not represented, where there can be no effective cross-examination of the state's witnesses, and where there can be no presentation of evidence available to the accused that might influence a district court judge to terminate the prosecution in the defendant's favor. By avoiding a preliminary hearing, the prosecutor is not threatened with the defendant's being able to "effectively discover his case," nor with development by the defense through interrogation of witnesses of a "vital impeachment tool for cross-examination at the trial." Coleman v. Alabama, 399 U.S. at 9. Avoidance of a preliminary hearing also assures the prosecutor that the defendant does not have an early opportunity to seek a reduction in bond, so that he will be effectively prevented from securing his release, getting in touch with witnesses, investigating the charges against him, obtaining the services of counsel, and otherwise preparing for trial. See, N.C.G.S. 7A-272(b).

The application of the Equal Protection Clause for which petitioner contends here, is required by Dowd v. United States, 340 U.S. 206 (1951). There state prison authorities, enforcing prison rules, prevented a prisoner from sending out appeal

documents until it was too late to take an appeal. After the restraint was removed, the prisoner filed a petition for a delayed appeal, which was denied by the state court as a matter of discretion. There no "fundamental rights" were involved, because the Constitution does not require state courts to provide appellate review at all in criminal cases. Griffin v. Illinois, supra. Nor was there a suspect classification involved, such as indigency or race. The court simply held that the denial of the statutory right of appeal to the prisoner was a discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment, since no rational justification for this distinction could be demonstrated.

The detention, prosecution, and imprisonment of this petitioner without a preliminary hearing, when preliminary hearings are regularly provided to others accused of felonies, can no more be sustained than analogous procedures stricken down by other decisions of this Court. In Baxstrom v. Herold, 383 U.S 107 (1966), it was held that the petitioner had been denied equal protection of the laws by a procedure under which he was civilly committed without the jury review of the determination of incompetency available to all other persons civilly committed in the state; and by petitioner's civil commitment to an institution maintained by the correctional department without a judicial determination that he was dangerously

mentally ill, as was afforded to all other persons so committed. In Jackson v. Indiana, 406 U.S. 715 (1972), petitioner, who was found incompetent to stand trial on criminal charges and was committed until certified sane, was found to have been denied equal protection of the laws because he was subjected to a more lenient commitment standard and a more stringent standard of release than those generally applicable to mental patients not charged with offenses.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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*The prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1527

Haywood L. Peele,

Appellant,

vs.

Robert E. Jones, Superintendent of
Polk Youth Center,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

Submitted August 31, 1973

Decided December 11, 1973

MEMORANDUM DECISION

A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, a certificate

of probable cause to appeal is denied, and the appeal is dismissed for the reasons stated by the district court. Peele v. Jones, etc., Civil Action No. 4146 (E.D. N.C. 1973).

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

H. E. Widener, Jr.
United States Circuit Judge

John A. Field, Jr.
United States Circuit Judge

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NORTH CAROLINA
Raleigh Division

No. 4146-Civil

HAYWOOD L. PEELE, Petitioner	)	
vs.	)	ORDER
ROBERT E. JONES, Superintendent of Polk Youth Center, and THE STATE OF NORTH CAROLINA, Respondents.	)	

Petitioner, a State prisoner, seeks to file in forma pauperis an application for Writ of Habeas Corpus. The Petitioner, with the assistance of counsel, was tried in Cumberland County Superior Court on the charge of murder, was convicted, and on January 20, 1972, received an active prison sentence. The application does not state the terms of the sentence. The Petitioner appealed his conviction by direct appeal to the Supreme Court of North Carolina, which Court affirmed his conviction on May 23, 1972, the written opinion being recorded in 281 N.C. 253.

The Petitioner bases his allegation that he is being held in custody in violation of the Constitution of the United

States upon the grounds that he was denied a preliminary hearing.

The petitioner filed an application for post-conviction relief in the Cumberland County Superior Court, which application was denied on September 19, 1972. The Petitioner then filed a petition for Writ of Certiorari to the North Carolina Court of Appeals to review said denial of post-conviction relief, which petition for Writ of Certiorari was denied on November 17, 1972. The grounds set forth for relief in his application for post-conviction hearing and appeal of the denial thereof are apparently the identical grounds set forth in this petition. The Petitioner has thereby exhausted his remedies in the State Courts of North Carolina as required by 28 USCA Section 2254(b).

North Carolina laws of criminal procedure do not require the granting of a preliminary hearing, nor is the lack of or denial of a preliminary hearing constitutionally significant where an accused is subsequently indicted. Rambo vs. Peyton, 380 F.2d 363, (4th Cir., 1967). The failure to afford a defendant a preliminary hearing does not constitute a violation of the Equal Protection of the Laws clause of the United States Constitution. Oyler vs. Boles, 368 U.S. 448 (1962).

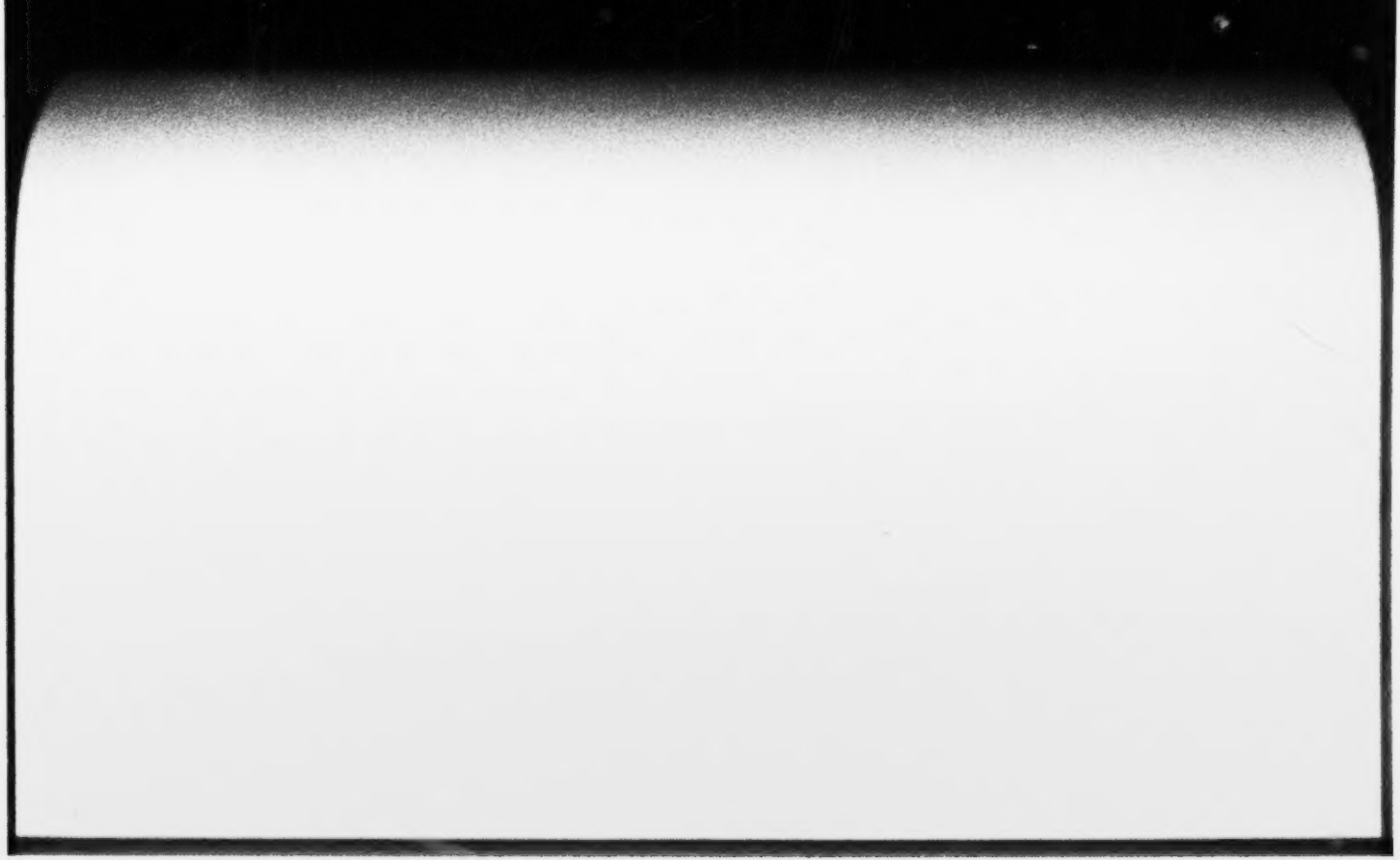
IT IS, THEREFORE, ORDERED:

1. That this application for Writ of Habeas Corpus be, and the same is, hereby denied.

2. That it is further ordered, for the purpose of the record only, that the Petitioner be allowed to file this application without prepayment of the filing fee.

This the 9 day of March, 1973.

John D. Larkins, Jr.
United States District Judge



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In The

Supreme Court of the United States

October Term, 1973

No. 73-1334

HAYWOOD L. PEELE,
Petitioner

v.

ROBERT E. JONES, Superintendent
Polk Youth Center,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF OF RESPONDENT, ROBERT E. JONES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

In a Memorandum Decision dated December 11, 1973, the United States Court of Appeals for the Fourth Circuit refused to issue a Certificate of Probable Cause to appeal from the Order of the District Court denying habeas corpus relief. PEELE v. JONES, Civil Action No. 4146 (E.D.N.C. 1973), mem. dec., No. 73-1527 (4 Cir., December 14, 1973). A copy of the Memorandum Decision of the United States Court of Appeals for the Fourth Circuit (Pet. Br. pp. 17-18), as well as the Order of the United States District Court for the Eastern District of North Carolina in PEELE v. JONES, Civil No. 4146 — Raleigh (E.D.N.C. 1973) are appended to the petition. (Pet. Br. pp. 19-21).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

WHETHER IT IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT FOR A STATE TO DENY A PRELIMINARY HEARING TO A CRIMINAL DEFENDANT BEFORE INDICTMENT, WHEN PRELIMINARY HEARINGS ARE FREQUENTLY ACCORDED CRIMINAL DEFENDANTS IN THAT JURISDICTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

General Statutes of North Carolina:

N.C.G.S. 15-85

Waiver of examination.—If any person arrested desires

to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any justice or judge of the General Court of Justice.

N.C.G.S. 15-86

Procedure, when justice has not final jurisdiction.—In all cases where a justice of the peace has not final jurisdiction of the offense he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided.

N.C.G.S. 15-87

Duty of examining magistrate.—The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses, produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel.

N.C.G.S. 15-88

Testimony reduced to writing; right to counsel.—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

N.C.G.S. 15-89

Prisoner examined; advised of rights.—The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

N.C.G.S. 15-95

When prisoner held to answer charge.—If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable and the prisoner offers sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison.

N.C.G.S. 7A-272 (b)

The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment.

STATEMENT OF THE CASE

Petitioner is presently committed under a life sentence to the North Carolina Department of Correction pursuant to a verdict of guilty of first degree murder entered on January 20, 1972, by the Superior Court of Cumberland County, North Carolina.

Peele was arrested on August 31, 1971, by officers of the Fayetteville, North Carolina, Police Department, charged with armed robbery and felony murder committed in the perpetration of the armed robbery. He was indicted by the Cumberland County Grand Jury during the September 20, 1971 Session of Court for first degree murder and armed robbery and was brought to trial in the Superior Court on the two bills of indictment. Peele was convicted and sentenced to life imprisonment for first degree murder. He was convicted and sentenced to an additional term of 25 to 30 years for armed robbery. The conviction of armed robbery was set aside by the Supreme Court of North Carolina when that Court determined the armed robbery was embraced in and a part of the first degree murder. The Court held that since Peele was convicted of the greater offense of murder, he could not be convicted of a lesser offense necessarily involved in and made a part of the greater offense. STATE v. PEELE, 281 N.C. 253, 188 S.E. 2d 326 (1972).

Subsequent to the affirming of the murder conviction by the Supreme Court of North Carolina, STATE v. PEELE, supra, Peele filed an application for post conviction relief in the Cumberland County Superior Court, which application was denied by that Court on September 19, 1972. He then filed a petition for a writ of certiorari to the North Carolina Court of Appeals to review the denial of the post conviction relief, and this petition for writ of certiorari was denied on November 17, 1972. The basis set forth for relief in Petitioner's applications for post-conviction hearing and appeal of the denial thereof are the identical grounds set forth in the petition for writ of certiorari to this Honorable Court.

Peele then applied for a writ of habeas corpus to the District Court of the United States for the Eastern District of North Carolina. The District Court denied Peele's application and he appealed to the United States Court of Appeals for the Fourth Circuit. The judgment of the District Court

became non-appealable by virtue of the decision of the United States Court of Appeals to deny a certificate of probable cause.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE A PRELIMINARY HEARING IN A STATE COURT.

It is no denial of the equal protection clause of the Fourteenth Amendment for a state to indict and try a criminal defendant without first providing him with a preliminary hearing. This is especially true in North Carolina since a preliminary hearing is not essential to the finding of an indictment. VANCE v. NORTH CAROLINA, 432 F. 2d 984 (4th Cir. 1970). North Carolina has no statute which requires a preliminary hearing and the State Constitution does not require one. STATE v. GASQUE, 271 N.C. 323, 329, 156 S.E. 2d 740 (1967), cert. denied, 390 U.S. 1030 (1968). Probable cause is established by grand jury indictment. BARBER v. U. S., 142 F. 2d 805, cert. denied, 322 U. S. 741 (1944). When an accused is tried upon an indictment, he is not entitled to a preliminary hearing. BARBARA v. ARKANSAS, 429 F. 2d 20 (8th Cir. 1970). Nor is there a state or federal requirement that a preliminary hearing be provided when the defendant is subsequently tried on a valid indictment. COLEMAN v. ALABAMA, 399 U. S. 1 (1970); PHILLIPS v. NORTH CAROLINA, 433 F. 2d 659 (4th Cir. 1970); STATE v. GASQUE, supra. A preliminary hearing is not required if there is an indictment, since both serve the same function, U.S. v. CHASE, 372 F. 2d 453 (4th Cir. 1967); BARBER v. U.S., supra; U.S. v. MACKEY, 474 F. 2d 55 (4th Cir. 1973), cert. denied, 37 L. Ed. 2d 401 (1973).

However, even assuming a right to a preliminary hearing under the statute in such instances, which is denied, a deprivation of a state right due to error does not violate the Equal Protection Clause, BRISCOE v. KUSPER, 435 F. 2d 1046 (7th Cir. 1970); POWELL v. POWER, 436 F. 2d 84

(2nd Cir. 1970); DELIA v. COURT OF COMMON PLEAS, 418 F. 2d 205 (6th Cir. 1969). There must be a purposeful or intentional deprivation executed by means of invidious classification, MOSS v. HORNIG, 314 F. 2d 89 (2nd Cir. 1963); WOODBERRY v. McKINNON, 447 F. 2d 839 (5th Cir. 1971); BOHUS v. BOARD OF EDUCATION, 447 F. 2d 821 (7th Cir. 1971), in order to violate the Equal Protection Clause. There is absolutely no showing in this regard. Accordingly, no federal right arising under the Equal Protection Clause is presented for review. Furthermore, the ". . . Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decision . . . [and such a] contention is clearly unsound." MILWAUKEE ELECTRIC RAILWAY v. WISCONSIN, 252 U. S. 100, 40 S. Ct. 302, 64 L. Ed. 476 (1920); BECK v. WASHINGTON, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). Essentially, such a claim would be only that the law was misapplied and this is not a basis for habeas corpus relief, BECK v. WASHINGTON, supra. Were the law otherwise, every unsuccessful litigant in state court proceedings would be able to demand that federal courts be the arbiter of the correctness of state court decisions and judgments concerning state law, SMITH v. VILLAGE OF LANSING, 241 F. 2d 856 (7th Cir. 1957); SAMPSELL v. CALIFORNIA, 191 F. 2d 721 (9th Cir. 1951); PAINTEN v. COMMONWEALTH OF MASS., 252 F. Supp. 851 (D.C. Mass. 1966); and the writ of habeas corpus would thereupon serve as an additional appeal on state matters, which it does not.

The North Carolina Supreme Court has held many times that a preliminary hearing is not a necessary step in the prosecution of a person accused of crime and an accused person is not entitled to a preliminary hearing as a matter of right STATE v. FOSTER, 282 N.C. 189, 192 S.E. 2d 320 (1972). In that case, Chief Justice Bobbitt, speaking for a unanimous Court at page 196, had the following to say:

"A preliminary hearing may be held unless waived by

defendant. G. S. 15-85 and G. S. 15-87. But none of these statutes prescribe mandatory procedures affecting the validity of a trial. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. STATE v. HARGETT, 255 N.C. 412, 413, 121 S.E. 2d 589, 590 (1961). 'We have no statute requiring a preliminary hearing nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing.' STATE v. HACKNEY, 240 N.C. 230, 237, 81 S.E. 2d 778, 783 (1954). Accord, GASQUE v. STATE, 271 N.C. 323, 329-330, 156 S.E. 2d 740, 744 (1967); STATE v. OVERMAN, 269 N.C. 453, 467, 153 S.E. 2d 44, 56 (1967); VANCE v. NORTH CAROLINA, 432 F. 2d 984 (4th Cir. 1970); CARROLL v. TURNER, 262 F. Supp. 486 (E.D.N.C. 1966).

"If the Grand Jury finds an indictment, there is no need to conduct a preliminary examination. 21 Am. Jur. 2d Criminal Law, § 442 (1965). Accord, JABEN v. UNITED STATES, 381 U.S. 214, 14 L. Ed. 2d 345, 85 S. Ct. 1365 (1965)."

Interpretations of state laws by the highest court of a state should be accepted by a federal court unless they conflict with the United States Constitution. WRIGHT v. RHAY, 323 F. 2d 653 (9th Cir. 1963), and a construction of a state statute by the highest court of a state binds a federal court. HUDDLESTON v. DWYER, 322 U.S. 232, 88 L. Ed. 1246 (1944); ALBERTSON v. MILLAND, 345 U.S. 242, 97 L. Ed. 983 (1953). Therefore, the interpretation of the North Carolina preliminary hearing statutes is binding on federal courts. These statutes have been interpreted by the North Carolina Supreme Court in STATE v. FOSTER, supra.

The Petitioner has not shown any prejudice resulting from his failure to have a preliminary hearing and he bears the

burden of proving such prejudice. U.S. ex rel JACKSON v. BRADY, 133 F. 2d 476 (4th Cir. 1943), cert. denied, 319 U.S. 746, 87 L. Ed. 1702; VIA v. PEYTON, 284 F. Supp. 961 (D.C. Va. 1968). In this case, Petitioner has suffered no prejudice because he received a transcript of the trial of the state's evidence in his confederate's trial. The issues and the witnesses in the two trials were almost identical because each of the defendants was charged with the commission of the same criminal acts. The evidence showed that they were together when the robbery and murder occurred.

The fact that others may have received preliminary hearings, while Peele did not, does not violate the equal protection of the laws. GRAVES v. EYMAN, 373 F. 2d 324 (9th Cir. 1967); DUNOVAN v. PEYTON, 292 F. Supp. 193 (D.C. Va. 1968). Minor differences in the appliction of rules of practice do not raise an equal protection question, WILLIAMS v. RHODES, 393 U.S. 23, 21 L. Ed. 2d 24 (1968), only discriminations which are "invidious" do. MOREY v. DOWD, 354 U.S. 457, 1 L. Ed. 2d 1485 (1957). Essentially, the decision to bypass the preliminary hearing by obtaining an indictment prior to the time of the preliminary hearing is a matter of proscutorial discretion and such action is not reviewable in the context of an allegation that the equal protection of the laws were not afforded, OYLER v. BOLES, 368 U.S. 448, 7 L. Ed. 2d 446 (1962); MOSS v. HORNIG, 314 F. 2d 89 (2nd Cir. 1963); OVERSTREET v. U.S., 367 F. 2d 83 (5th Cir. 1966). Accordingly, Peele's contention, insofar as it is based on the equal protection clauses of the Constitution of the United States and North Carolina, is without merit.

CONCLUSION

From the foregoing arguments and authorities, it conclusively appears that Petitioner has brought no matter to this Court's attention which would justify its further consideration of his case. He has wholly failed to show either a legal

wrong amounting to an infringement of his constitutional rights, or any prejudicial damage to him arising out of same. Accordingly, his application for writ of habeas corpus was properly denied by the district court; his appeal was properly dismissed by the Court of Appeals; and certiorari should not issue from this Honorable Court to further review Petitioner's case.

This 13 day of May, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief on counsel for the Petitioner, Norman B. Smith, of the firm of Smith, Carrington, Patterson, Follin & Curtis, by placing three (3) copies in the United States Mail at Raleigh, North Carolina, postage prepaid, to 704 Southeastern Building, Greensboro, North Carolina - 27401, on this 13 day of May, 1974.

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